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No. 95-1872

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

THE HONORABLE WILLIAM STRATE, Associate Tribal Judge of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation; THE TRIBAL COURT OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION; LYNDON BENEDICT FREDERICKS; KENNETH LEE FREDERICKS; PAUL JONAS FREDERICKS; HANS CHRISTIAN FREDERICKS; JEB PIUS FREDERICKS; GISELA FREDERICKS,

Petitioners,

v.

A-1 CONTRACTORS; LYLE STOCKERT,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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Respondents' Brief in Opposition merely intones the majority opinion of the Court of Appeals below and fails to rebut the key reasons presented by the Petition for granting *Certiorari* in this case. Those reasons are the confusion surrounding application of this Court's decisions and the legal principles intrinsic to those decisions;[1] the conflict between the majority opinion of the Court of Appeals below and the decisions of this Court; and conflict between the majority opinion of the Court of Appeals below and decisions of the Court of Appeals for the Ninth Circuit. In this Reply Brief, Petitioners address specific arguments and points raised by Respondents.

1. Respondents contend (Respondents' Brief in Opposition at 5-6) (hereinafter "Resp. Br."), and the Court of Appeals below held (App. 13), that a rule of general and implicit divestiture of tribal civil jurisdiction over non-Indians was established in *Montana v. United States*, 450 U.S. 544 (1981). This claim flies in the face of the express refusal by this Court in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 854 (1985), to extend to the civil arena the rule in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), that tribes have been generally and implicitly divested of criminal jurisdiction over non-Indians.[2] The Court in

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[1] The issues presented in the Petition continue to vex lower courts. In the case of *Wilson v. Marchington* and Inland Empire Shows, No. CV-92-127 GF (D. Mont. Nov. 8, 1995), *appeal docketed*, No. 96-35145 (9th Cir. Jan. 30, 1996), the district court found that a tribal court has jurisdiction under federal law to hear a tort claim against a non-Indian who, while traveling on a road within an Indian reservation, was involved in an accident with a member of the tribe. The district court wanted to adopt the argument that this Court's cases have found tribal civil jurisdiction over the activities of non-Indians on Indian land to have been "generally and implicitly" divested. However, the court felt compelled to honor the holding of *Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 485 (1994), that tribal civil jurisdiction on Indian land, even over non-Indian activities, can be defeated only by an express act of Congress.

[2] The position of Respondents cannot even be reconciled with *Montana*, where this Court held, *inter alia*, that the Tribe in that case "may

National Farmers "conclude[d] that the answer to the question whether a tribal court has the power to exercise civil jurisdiction over non-Indians . . . is not automatically foreclosed, as an extension of *Oliphant* would require." *National Farmers*, 471 U.S. at 855.[3] There is, therefore, confusion and conflict over whether *Montana* accomplished a general and implicit divestiture of tribal jurisdiction over the activities of non-Indians on Indian land.

2. Contrary to Respondents' assertion, the Petition does not attempt to distinguish the present case from the *Montana*, *Brendale*[4], and *Bourland*[5] cases on the basis of any purported regulatory/adjudicatory distinction. Petitioners argue that these cases are distinguishable because they contain three essential elements not present in the case *sub judice*: 1) land taken from a tribe by Congress for non-Indian ownership or occupation; 2) conduct of the non-Indians on the fee or taken land which posed no threat to the welfare of a tribe; and 3) a conflict between a tribe and a state or federal agency over competing regulatory jurisdiction. (Petition at 11). Respondents distort this argument into one claiming that the three cited cases "are strictly limited to . . . disputes addressing tribal regulatory power over non-Indians as opposed to tribal adjudicatory power over non-Indians," (Resp. Br. at 10).

3. Petitioners concede that the *Montana* "tribal interests test"[6] applies to activities of non-Indians on their fee lands.

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prohibit nonmembers from hunting and fishing on land belonging to the Tribe or held by the United States in trust for the Tribe. . . . " *Montana*, 450 U.S. at 557 (citation omitted).

[3] Nor is *National Farmers* a mere exhaustion case. If *Montana* accomplished a general divestment, there would have been no reason to establish the tribal exhaustion requirement. "If we were to apply the *Oliphant* rule here, it is plain that any exhaustion requirement would be completely foreclosed. . . . " 471 U.S. at 854.

[4] *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989).

[5] *South Dakota v. Bourland*, 508 U.S. 679 (1993).

[6] Set out in the Petition at 9.

Respondents, however, argue that the tribal interests test applies on non-fee lands – *i.e.*, Indian lands. Respondents cite three Court of Appeals cases,[7] none of which support this conclusion. (Resp. Br. at 11).

The legal issue in *Stock West* was whether a federal court should abstain in favor of a tribal court so that tribal remedies could be exhausted. A key factual issue was whether the alleged activity giving rise to the underlying dispute arose on Indian land. Because the Court of Appeals required exhaustion, the federal courts had no occasion to reach either the issue of tribal jurisdiction on the merits or the applicability of the "tribal interests test."

FMC indisputably involved tribal jurisdiction over the activities of non-Indians on fee lands and the court found that the Tribe had jurisdiction.

Tamiami cites *Montana* in a footnote on a matter related to tribal sovereign immunity stating that "[t]he Supreme Court has continuously acknowledged tribal courts' inherent power to exercise civil jurisdiction over non-Indians in conflicts affecting the interests of Indians on Indian lands."

Plainly, these cases do not support the position, advanced by Respondents (Resp. Br. at 11) and the Court of Appeals below (App. 16), that other courts have relied upon or cited *Montana* in jurisdictional disputes involving Indian lands. And, assuming *arguendo* that they did, such decisions would further serve to highlight the conflict with other cases which have held the opposite. *See, e.g.*, Petition at 13-15; *see also U.S. ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 906 (9th Cir. 1994) (where the court observed in a contract action by an Indian tribe against a tribal member and a non-Indian that, "[s]trictly speaking, the *Montana* exceptions are relevant only after the court concludes that there has

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[7] *Stock West Corp. v. Taylor*, 964 F.2d 912 (9th Cir. 1992); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1312 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991); *Tamiami Partners Ltd. v. Miccosukee Tribe of Indians of Florida*, 999 F.2d 503, 508 n.11 (11th Cir. 1993)

been a general divestiture of tribal authority over non-Indians by alienation of the land.").

4. Respondents make a number of additional assertions which touch only tangentially on the issue of whether this Court should accept *certiorari*. Petitioners nevertheless address these assertions here to ensure that should *certiorari* be granted, Petitioners' position will be preserved.

a. Respondents claim that there is no question that the State of North Dakota would have jurisdiction over this case and that state court is the proper forum for the lawsuit. (Resp. Br. at 2 n.2). While Petitioners agree that there may be concurrent jurisdiction, the issue of state court jurisdiction is clearly not before the Court in this case.

b. Respondents claim that the finding of the federal district court that Lyle Stockert, the driver for and part owner of A-1 Contractors, was within the scope of his employment at the time of the accident (App. 74), was "modified" by the Court of Appeals. (Resp. Br. at 15). A court of appeals may not substitute its judgment for that of a district court on a finding of fact unless the factual finding is clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. 564, 573-574 (1985). No such determination was made by the Court of Appeals below. Furthermore, if a district court's factual finding is inadequate, a court of appeals may not find the fact on its own but must remand with directions to make appropriate findings. *Fogarty v. Piper*, 767 F.2d 513, 515 (8th Cir. 1985). Moreover, as a matter of law the issue of whether Stockert was within the scope of his employment at the time of the accident is relevant to liability, not tribal jurisdiction. *See, e.g., Breeding v. Massey*, 378 F.2d 171 (8th Cir. 1967).

c. Respondents note that Petitioners (the Fredericks) originally sought $10,000,000 in punitive damages in this case. (Resp. Br. at 2 n.3). While that is correct, it is irrelevant and was, in any event, dropped by Petitioners with the dismissal of Continental Western Insurance Company from the case. Respondents' unfounded claim that this case was brought in tribal court to take advantage of family and personal connections (Resp. Br. at 2 n.2), is the basest sort of speculation, and should be ignored.

d. Respondents claim that if a government may exercise jurisdiction over those who voluntarily enter into contracts with it, this would lead to the unwillingness of nonresidents of the jurisdiction to enter into agreements with that sovereign. (Resp. Br. at 15-16). This claim is entirely speculative, devoid of any support in the record, and defies common sense. Even if true, the decision about such contracts would be one of policy for the sovereign, it would not defeat jurisdiction. Respondents further claim that LCM (the tribal corporation) and A-1 included a clause in their contract – which is not a part of the record – agreeing to abide by the law of a foreign jurisdiction for the purpose of avoiding such "problems". (Resp. Br. at 16). This desperate claim is the sheerest speculation and should also be ignored.

CONCLUSION

For the reasons stated above and in the Petition, this Court should grant the Petition for a Writ of *Certiorari*.

Respectfully submitted,

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